IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-209

LARRY FRENCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GERALD M. BIRNBERG
WILLIAM E. YAHNER
8303 Southwest Freeway
Suite 909
Houston, Texas 77074
Attorneys for Petitioner

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

LARRY FRENCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LARRY FRENCH, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case March 31, 1978. A petition for rehearing was denied July 6, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. A copy is appended as Appendix I. The opinion of the Court of Appeals on petition for rehearing is also unreported. A copy is appended as Appendix II.

JURISDICTION

The judgment of the Court of Appeals was entered March 31, 1978. Petition for rehearing was denied July 6, 1978.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254(1), United States Code.

QUESTIONS PRESENTED

I. Whether a federal indictment must be dismissed when it is based solely upon the unconsented to testimony of one spouse against the other (in a situation not otherwise coming within any exception to the husband-wife testimonial ban) where the prosecutor eliciting such testimony before the grand jury was fully aware of the marital relationship?

II. Whether the Due Process Clause of the Fifth Amendment to the Constitution of the United States requires dismissal of a federal prosecution brought subsequent to a state conviction and predicated on the same conduct when the United States Attorney failed to obtain prior authorization, based on a determination that there was a compelling federal interest in an additional prosecution of the accused, from the appropriate Assistant Attorney General, as required by the well-established Department of Justice policy known as the *Petite* policy?

CONSTITUTIONAL PROVISIONS AND DEPARTMENT OF JUSTICE POLICY INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . . deprived of life, liberty, or property, without due process of law;

The United States Attorneys' Manual, Title 2, p. 3 provides:

> Furthermore, it is Department policy that after a State prosecution, there should be no Federal trial for the same overt act or acts unless there are compelling Federal interests involved, in which case prior authorization should be obtained from the appropriate Assistant Attorney General having jurisdiction over the subject matter of the case.

STATEMENT OF THE CASE

On October 16, 1975, Petitioner, Larry French, was arrested (along with several other individuals) in connection with a marijuana importation investigation spearheaded by the Drug Enforcement Administration (DEA), with the cooperation and assistance of Arkansas State Police. The investigation had commenced when the DEA received information that certain individuals were looking for persons to assist in a marijuana smuggling endeavor, and, through a series of undercover activities the DEA arranged to provide one of its agents and its airplanes for that purpose. Ultimately, a plane loaded with marijuana was flown by the DEA from Colombia, South America, to Chickasha, Oklahoma, through New Orleans, Louisiana. In Chickasha it was unloaded and transported to a farm in Washington County, Arkansas.

Following the arrest of the Petitioner at the farm, a Prosecutor's Information was filed in State Court in Arkansas charging the Petitioner with Possession of a Controlled Substance (Marijuana) with Intent To Deliver, in violation of Ark.stats.ann.sec. 82-2617. After a jury trial in State Court, the Defendant was found guilty of the state offense and, on December 22, 1975, sentenced to eight (8) years in prison.[1]

---

[1] That conviction was ultimately reversed by the Arkansas Supreme Court. Thereafter, the Petitioner entered a plea of guilty to the state charges.

After the Defendant had been convicted in State Court, a Federal Grand Jury was convened in the Western District of Oklahoma. The only witness to testify before that Grand Jury was the Petitioner's wife, Barbara French, who testified on January 7, 1976. As a result of that testimony, the Grand Jury returned an indictment on March 3, 1976, charging the Petitioner, and several other individuals, with conspiracy to import marijuana from Colombia, unlawful importation thereof, and conspiracy to distribute the marijuana thus unlawfully imported.

Prior to trial, Petitioner filed a Motion for Rule 16 Discovery and Inspection, and requested, in Paragraph Six thereof, to inspect the Grand Jury Transcript, (the testimony of his wife, Barbara French) as grounds may exist for a Motion to Dismiss the Indictment because of a violation of the Petitioner's marital privilege. The basis for that request was Rule 6(e) of the Federal Rules of Criminal Procedure, which allows such inspection of Grand Jury testimony "when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury". The Trial Judge denied the Defendant's motion, citing *United States* v. *Kysar,* 10th Cir., 1972, 459 F.2d 422 and *Costello* v. *United States,* 1956, 350 U.S. 359, thereby ruling that the Petitioner would not be entitled to have the indictment dismissed, even if (as the transcript of the Grand Jury testimony of Barbara French clearly reveals) the indictment was based upon evidence obtained in violation of the spousal testimonial bar.

Trial of all defendants initially commenced on May 11, 1976, but the first trial had to be aborted when, during the course of the trial, it became apparent that the Trial Court's effort to accommodate both the Petitioner's marital privilege and the codefendants' right to present evidence favor-

able to them was, in the words of the appellate court "not working". Accordingly, a mistrial was declared. About a month later, Petitioner waived jury trial and stipulated that the evidence in the first trial be re-offered as the evidence in his re-trial. Thereafter he was found guilty by the Court on Counts I and II of the indictment, but acquitted on Count III.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Petitioner asserted, among other issues, that the indictment should have been dismissed because the government violated the Defendant's marital privilege before the Grand Jury, thus depriving the Defendant of his Fifth Amendment right to Due Process of Law, and Petitioner asserted that the Federal prosecution, commenced after he had been convicted in State Court on charges arising out of the very same transaction, violated the *Petite* policy. As to the marital privilege issue, the Court of Appeals held simply that "the defendant did not assert a husband-wife privilege during the grand jury proceedings, nor did his wife. We find no merit to the defendant's challenge to the grand jury proceedings. *United States* v. *Kysar,* 459 F.2d, 422 (10th Cir.)". As to the *Petite* issue, the Court on petition for re-hearing rejected Petitioner's argument for the reason that it was held to be precluded by the majority opinion in the en banc companion case of *United States* v. *Bruce Thompson,* No. 76-1883, decided June 15, 1978. Accordingly, the Tenth Circuit denied the Petition for Re-Hearing on July 6, 1978, and this Petition for Writ of Certiorari was timely filed thereafter.

REASONS FOR GRANTING THE WRIT

I. As To The Marital Privilege Issue

This case presents an important question of federal law which has not yet been, but should be, settled by this Court:

Whether an indictment based solely on testimony of a wife incriminating her husband, elicited by a prosecutor possessing full knowledge of the marital relationship, and not consented to by the husband-defendant, must be dismissed?

It is, of course, well established that one spouse cannot testify against the other spouse — even voluntarily — unless the endangered spouse consents. *Hawkins* v. *United States,* 1958, 358 U.S. 74, 79 S.Ct. 136 3 L.Ed.2d 125; *Stein* v. *Bowman,* 13 Pet. 209, 10 L.Ed. 129 38 U.S. 209; *Funk* v. *United States,* 1933, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369; *Benson* v. *United States,* 1892, 146 U.S. 325 13 S.Ct. 60, 36 L.Ed. 991; *United States* v. *Mitchell,* 2 Cir., 137 F.2d 1006, cert. denied, 321 U.S. 794, 64 S.Ct. 785; *United States* v. *Apodaca,* 10 Cir., 1975, 522 F.2d 568; *United States* v. *Fields,* 3 Cir., 1972, 458 F.2d 1194, cert. denied, 412 U.S. 927, 93 S.Ct. 2755, 37 L.Ed.2d 154; *United States* v. *Moorman,* 7 Cir., 1966, 358 F.2d 31, cert. denied 385 U.S. 866, 87 S.Ct. 127. It is equally beyond dispute that a spouse cannot be compelled to testify before a grand jury over a valid invocation of marital privilege. *Blau* v. *United States,* 1951, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306. The issue in this case involves a ramification of those two doctrines in a situation where the prosecutor has presented a wife's incriminating testimony against her husband to a grand jury without the husband's consent, resulting in the indictment of the husband, based exclusively upon his spouse's testimony. Cf. *United States* v. *Farrington* D.C. N.Y. 1881, 5 F. 343. It is this situation to which this Court has never addressed itself and which is squarely presented by this case.

A. *Nature of Spousal Testimonial Bar*

The husband-wife relationship has given rise to several *distinct* rules of evidence. These include: (1) the archaic, and since disregarded (*Funk* v. *United States,* 1933, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369) rule disqualifying a husband or wife from testifying on the other's behalf; (2) a marital "privilege" protecting the confidentiality of communications between husband and wife (see *Wolfe* v. *United States,* 1933, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed.2d 17; *Hawkins* v. *United States, supra,* 358 U.S. 81 n. 2, 79 S.Ct. 410 n. 2 (Stewart J., concurring)); and (3) the absolute and unqualified right of a spouse to bar testimony against him or her by the other spouse (see *Hawkins* v. *United States, supra*).[2] It is the last of those three items — the bar preventing one spouse from giving incriminating testimony against the other without the endangered spouse's consent — that is at issue in this case.

The history of the right of a spouse to prevent the other spouse from testifying against him or her can be traced back to at least 1580. 8 J. WIGMORE, EVIDENCE § 2227 (1961 and Supp. 1977). Apparently this privilege predates the disqualification of husband and wife to testify on one another's behalf. At all events, Dean Wigmore concludes that "the privilege [to preclude testimony by one's spouse] may be said to have been understood to exist in some shape before the end of the 1500's and to have been firmly established by the second half of the 1600's." Thus, it is a rule long known to the common law and well entrenched in American jurisprudence.

Whenever its origin, the policy of the rule is plain. As Lord Coke explained as early as 1628, the reason that a spouse could not be produced as a witness against the other spouse (without the latter's consent) is that "it might be

[2] There are certain specifically delineated exceptions to this general rule, both statutory and decisional, all generally encompassed in Supreme Court Standard 505(c) as promulgated, but none of the exceptions has any applicability to the case at bar.

a cause of implacable discord and dissention between the husband and the wife." 8 J. WIGMORE, EVIDENCE § 2227 (1961). This rationale was reiterated throughout the centuries in case after case. One of the more eloquent expositions of the policy of the law in this regard is set forth by Dean Wigmore in quoting from Abbott, 2 *The Trial of Henry Ward Beecher,* (Tilton v. Beecher, City Ct. of Brooklyn, N.Y.) 49-50 (1875):

> [T]here are certain institutions of society lying at the base of our civilization, sustaining the whole fabric of its prosperity, its purity, its dignity, and its strength, which must not be undermined, or corrupted, or disfigured, or defiled, under the notion that in the administration of justice the truth must be sought in every quarter and from every witness. Thus the great minds, legislative and judicial, the great moralists, the great religious teachers, have all combined to say that there are certain limits imposed by the nature of human society in the fabric as it is constituted, for our defense and protection, that cannot be overpassed. . . .. [W]hen the common law says that a man and his wife are one, or, in Lord Coke's language: "As two souls in one person" — it is said no man shall put asunder those who are thus joined together, and, least of all, in the name of law, shall the administration of justice pull and tear asunder this conjugal relation by the step of the sheriff or the precept of the judge that compels one to come and betray the other. It is not, when the question comes before the Court, so much the interest, or the duty, or the particular circumstances of the individual case of marriage that are thus brought up for attention, as the institution itself.

The seminal federal case on the subject, *Hawkins* v. *United States, supra* explained the rationale in more modern, but no less fundamental terms: "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake

was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and it is not now. * * * Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. * * * [T]here is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned." 358 U.S. 77-79, 79 S.Ct. 138-39.

Thus strong considerations of public policy — interests going to the very fiber of the society, the strength and stability of the family unit — have dictated an unfaltering adherence to a rule of law nearly 400 years old. A spouse cannot testify against the other spouse (except in specific limited situations not applicable here) unless both spouses consent to the testimony. *Hawkins* v. *United States, supra.*[3]

B. *Remedy For Knowing Violation — Dismissal of Indictment*

It is undisputed in the present case that the indictment of the Petitioner resulted directly from the testimony of his wife and that the Petitioner did not consent[4] to such

[3] It is clear, in view of *Hawkins,* that the testimonial bar is not overcome by the fact that the testifying spouse wishes to do so or otherwise voluntarily consents to give testimony. The testimony is barred unless *both* parties consent. *Nanfito* v. *United States,* 8 Cir., 1927, 20 F.2d 376; *Jackson* v. *United States,* 5 Cir., 1958, 250 F.2d 897, 900; *Olender* v. *United States,* 9 Cir., 1954, 210 F.2d 795, 800.

[4] The Tenth Circuit would apparently place the burden upon Petitioner to assert a husband-wife privilege in this case. However, it is clearly the law that *both* spouses must waive the

testimony. Petitioner's wife was the only witness to testify before the grand jury. The Assistant United States Attorney presenting the case to the grand jury was indisputably fully aware of the marital relationship then existing between the witness and the Petitioner, as he repeatedly referred to the Petitioner as "your husband" (see e.g. Grand Jury Testimony of Barbara French, pps. 2, 4, 7, 9, 10). Thus, it is indisputable on this record that the indictment of the Petitioner was the product of a prosecutor's knowing disregard of a spouse's right to bar testimony against him by the other spouse.

The question which this Application presents — and one which this Court has never heretofore definitively determined — is whether dismissal of an indictment so obtained is the appropriate (and/or constitutionally required) remedy in such circumstances. For at least three separate reasons, Petitioner urges that the foregoing inquiry must be answered in the affirmative.

1. *Due Process Violation.* In the first place, Petitioner would show that the prosecutor's *knowing* use of testimony elicited in violation of the husband-wife privilege constitutes a Due Process violation which can be effectively remedied only by dismissal of the indictment. A grand jury may, of course, consider incompetent evidence, "but it may not itself violate a valid privilege, whether established by the constitution, statute, or the common law". *Branzburg* v. *Hayes,* 1972, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626; *United States* v. *Bryan,* 1950, 339 U.S. 323, 70 S.Ct., 724, 94 L.Ed. 884; *Blackmer* v. *United States,* 1932, 284 U.S. 421,

privilege before any testimony can be heard. (see citations, *infra.*) Petitioner had no knowledge of his wife having been called to testify before a federal grand jury in Oklahoma since he was incarcerated in an Arkansas State Prison at the time. Indeed, Petitioner would not have been permitted direct access to the grand jury to raise an objection to his wife testifying even if he had been aware that she was called as a witness.

52 S.Ct. 252, 76 L.Ed. 375; *United States* v. *Calandra,* 1974, 414 U.S. 343, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561; 8 J. WIGMORE, EVIDENCE §§2290-2391 (1961 & Supp. 1977). Since the grand jury itself may not violate the husband-wife testimonial bar, *Blau* v. *United States,* 1951, 340 U.S. 332, 333 71 S.Ct. 301, 95 L.Ed. 306; *Nanfito* v. *United States,* 8 Cir., 1927, 20 F.2d 376, 378; *United States* v. *Calandra, supra,* a prosecutor's knowing and intentional disregard thereof must constitute an abuse of the grand jury and, thereby, a Due Process infringement. *United States* v. *Farrington,* D.C. N.Y. 1881, 5 F. 343, 348.

In this regard, the prosecutor's knowing use of testimony obtained in violation of the husband-wife privilege is functionally indistinguishable from a prosecutor's knowing use of perjured testimony. The latter circumstance clearly implicates considerations of — and constitutes a violation of — Due Process of law. *Mooney* v. *Holohan,* 1935, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Pyle* v. *State of Kansas,* 1942, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Alcorta* v. *State of Texas,* 1957, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed. 2d 9; *Napue* v. *People of State of Illinois,* 1959, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217; *Miller* v. *Pate,* 1967, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 960.

Although this Court has never delineated the perimeters of the concept, the Supreme Court has never doubted that abuse of the grand jury by prosecutors could result in a Due Process violation vitiating any resulting indictment. For example, in *United States* v. *Mandujano,* 1976, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212, the Court specifically noted that "nothing remotely akin to 'entrapment' or *abuse of process* is suggested by what occurred here," citing apparently approvingly, *Brown* v. *United States,* 8 Cir., 1957, 245 F.2d 49. In *Brown,* the Court of Appeals had disapproved, presumedly on some Due Process notion, the use of a grand jury by a prosecutor to elicit testimony from

a target witness solely for "the purpose to get him indicted for perjury and nothing else." *Brown, supra,* 245 F. 2d. 555. The holding of *Brown,* and significance of its citation in *United States* v. *Mandujano, supra,* appears to be an express disapproval of utilizing a grand jury in a manner calculated to infringe upon established notions of fundamental fairness, Due Process, and basic policy of the nation.

Similarly, in *Blackledge* v. *Perry,* 1974, 417 U.S. 26, 94 S.Ct. 2098, 40 L.Ed. 2d 628, the Supreme Court condemned, as a Due Process violation, the actions of a prosecutor in seeking an indictment of a defendant for a "vindictive" purpose (in that case, to punish the defendant for exercising a statutory right to appeal *de novo* a misdemeanor conviction on a lesser charge). The prosecutor's use of the grand jury in that case constituted an abuse of that body, resulting in a violation of Due Process and invalidation of the resulting indictment.

The lower courts have been similarly sensitive to abuse of the grand jury process, dismissing resulting indictments as violative of recognized standards of Due Process. For example, in *United States* v. *Basurto,* 9 Cir., 1974, 497 F.2d 781, the Ninth Circuit concluded that "The Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony." 497 F.2d 785.[5] Similarly in *United States* v. *DeMarco,* 9 Cir., 1977, 550 F.2d 1224, the Ninth Circuit affirmed the dismissal of the indictment, on Due Process grounds, where the prosecutor had failed to inform the grand jury that one of the factors leading him to seek the indictment was the defendant's refusal to waive his statutory venue rights in certain federal tax prosecutions. Again, the actions of the prosecutor appearing before the grand jury were characterized as constituting an abuse of the grand jury, amounting to a denial of Due Process of law. See also, *United States* v. *Estepa,* 2 Cir., 1972, 471 F. 2d. 1132; *United States* v. *Doss,* 6 Cir., 1977, 545 F.2d 548; *General Motors Corp.* v. *United States,* 6 Cir., 1978, ... F.2d .... [No. 77-1599 April, 1978]

[5] In that case the government had discovered, at some point, that the primary witness before the grand jury had not been truthful in his testimony under oath to that body. The Ninth Circuit ruled that "whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel — and, if the perjury may be material, also the grand jury — in order that appropriate action may be taken." Relying on "the principle that a State may not knowingly use false evidence, including false testimony, to obtain a conviction," the Court ruled that "the same result must obtain when the government allows the defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony." 497 F.2d 786. The conviction in that case was accordingly reversed, "because the prosecuting attorney did not take appropriate action to cure the indictment upon discovery of the perjured grand jury testimony."

In the present case, the indictment resulted solely from the presentation to the grand jury of testimony elicited from the Petitioner's wife by a prosecutor knowing of the marital relationship. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the [law], intended for the protection of the people against such unauthorized action." *Weeks* v. *United States,* 1914, 232 U.S. 383, 391-92, 94, 34 S.Ct. 341, 344-45, 58 L.Ed. 652. "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." *Olmstead* v. *United States,* 1928, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (J. Brandeis and J. Holmes, dissenting). "The law" is that a spouse may not testify, before a grand jury, or any other investigating body or judicial forum, without the consent of the other spouse. Not only did the government fail to

observe scrupulously "the law" in this case, it, through the Assistant United States Attorney, intentionally and knowingly disregarded "the law". In such circumstances, Due Process of Law has beeen cast aside, and the resulting indictment must, necessarily, be dismissed.[6]

2. *Undoing The Damage Done.* The purpose served by the husband-wife testimonial bar is the alleviation of the strain on the marital relationship which inevitably results

[6] Although the retrospective determination that an indictment was based upon evidence obtained in violation of a Fourth or Fifth Amendment right will not undermine the validity of the resulting indictment, the present case does not present a similar situation. Conceding that the functions of a grand jury preclude a prospective determination regarding the adequacy or competency of the evidence (see, e.g. *United States* v. *Calandra, supra,* 414 U.S. 345, 44 S.Ct. 618; *Costello* v. *United States,* 1956, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397), this fact does not countenance the *intentional* and *knowing* misuse of the grand jury process to obtain otherwise privileged or inadmissible evidence, and the latter circumstance is certainly protected by the Due Process Clause. *United States* v. *Tane,* 3 Cir., 1964, 329 F.2d 848, 854-54; *Coppedge* v. *United States,* D.C. Cir., 1962, 311 F.2d 128, 131-32; *Jones* v. *United States,* D.C. Cir., 1964, 342 F.2d 863, 872-74. For example, although an indictment will not be dismissed because it is ultimately determined that the evidence presented to the grand jury was obtained in violation of the Fifth Amendment privilege, *Lawn* v. *United States,* 1958, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321, it could not seriously be argued that Due Process would not be violated by an indictment resulting from a witness' hypothetically, having been called before a grand jury, physically beaten there, and thereby forced to "confess" to the crime for which he is ultimately indicted. Similarly, and again hypothetically, it could not seriously be argued that Due Process was not violated by an indictment resulting from a grand juror going to the suspect's house and, without benefit of warrant, proceeding to conduct a search resulting in the discovery of incriminating evidence. Thus, the general principle that an indictment is not voided by constitutional violations notwithstanding, it is self-evident that a *knowing* and *intentional* violation of the defendant's rights by the grand jury itself, or the prosecutor presenting the case to the grand jury, would constitute a Due Process violation requiring vacation of any resulting indictment.

from a spouse having given adverse testimony against the other spouse, resulting in the criminal condemnation of the incriminated spouse. Certainly, once the testimony has escaped the lips of the incriminating spouse, the damage is, to a significant extent, accomplished. Admittedly, one 'cannot unring a bell'; 'after the thrust of the sabre it is difficult to say forget about the wound'; and finally, 'if you throw a skunk in the jury box, you cannot instruct the jury not to smell it'. *Dunn* v. *United States,* 5 Cir., 1962, 307 F.2d 883, 886. In other words, once a spouse has been required to testify against his or her husband or wife, the prying apart of the marital relationship is, virtually irreparably, a *fait accompli.*

Nonetheless, a marriage deteriorated by an invasion of the husband-wife privilege is not necessarily a marriage destroyed. Certainly, if the underlying premise of the marital privilege is correct, the fact that one spouse has testified against the other spouse would undoubtedly impose a significant, but not necessarily insurmountable, strain upon the marital relationship. On the other hand, whatever chance there may be for a healing of the marital rift occasioned by the fact that a wife has testified against her husband (or vice versa), is certainly lessened, if not totally eviscerated, by the concurrent pendency of a criminal prosecution. That is, even if the marital relationship could somehow overcome the strain of one spouse having testified against the other, resulting in the indictment of the non-testifying spouse, the emotional pressure of the ongoing criminal prosecution significantly interferes with any such healing process.

This Court has frequently, though in different context, adverted to the severe personal trauma incident to being a defendant in a pending criminal prosecution. For example, the Court has repeatedly noted that the underlying idea of

the protection against double jeopardy is to avoid "subjecting [the defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green* v. *United States,* 1957, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199. Similarly, the Sixth Amendment guarantee of a speedy trial is designed to protect the accused from, among other things, the "emotional stress than can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial." *Strunk* v. *United States,* 1973, 412 U.S. 434, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56.

Obviously, these pressures, stresses and strains are exacerbated in a circumstance, such as that presented in this case, where the criminal prosecution is predicated upon violation of the husband-wife testimonial privilege, with its resultant imposition upon matrimonial harmony. In this circumstance, the accused has not only the strain of a pending prosecution to deal with, he (or she) must also cope with an assault upon the marital relationship occasioned by the prosecutor's knowing violation of a four hundred year old rule of law.

In this context, dismissal of the indictment is necessary to preserve any meaningful realization of the objective sought to be accomplished by the marital privilege in its conceptual origin. Whatever hope there may be to salvage this societally important marital relationship despite the breach of confidence occasioned by a violation of the privilege is certainly (and perhaps insurmountably) undermined by the additional strain, stress and pressure engendered by the presence of an ongoing criminal prosecution.

Thus, if the harm is to be undone and the marital relationship restored to its desired harmonious position, such a result can best be accomplished (if at all) by a discontinuation of the pending criminal prosecution, which certainly

aggravates the marital problem. Thus, while dismissal of an indictment obtained by a knowing violation of the marital privilege may not "unring the bell", it can certainly mute its madding toll. Conversely, failure to dismiss such an indictment can only amplify the distortions of the marital relationship, since the strain of the marital breach is compounded by the pressures attendant to a pending criminal case.

In these circumstances, the only remedy which can hope to undo the harm is a discontinuation of the criminal prosecution (i.e., a dismissal of the indictment). Any other course merely aggravates the problem and compounds the strain upon the marital relationship.

3. *Prophylactic Effect of Dismissal.* If dismissal of an indictment is not imposed as a sanction for *knowing* violation of the marital privilege, there exists no efficacious means of deterring zealous prosecutors from repeated invasions of the husband-wife relationship in the manner depicted by this record. On the other hand, a rule requiring dismissal of any indictment obtained through a *knowing* disregard for the husband-wife testimonial ban would serve a societally important prophylactic purpose. Certainly prosecutors would be less inclined to seek indictments based upon the unconsented to testimony of a spouse against the other spouse where the invariable result thereof would be a dismissal of the indictment.

Suppression of the wife's testimony at trial would not be an efficacious deterrent to the continual invasion of the marital relationship in grand jury proceedings. In the first place, there is a self-fulfilling prophecy which comes into play here: the marital discord occasioned by the spouse's testimony before the grand jury may well lead to a deterioration and ultimate dissolution of the marital relationship which would remove any bar to testimony at the time of

trial. *Pereira* v. *United States,* 1954, 347 U.S. 1, 6 74 S.Ct. 358, 98 L.Ed. 435. Thus, if the prosecutor can tear asunder the marital relationship by obtaining a spouse's testimony before the grand jury, it is unlikely (if the premises underlying the marital testimonial bar privilege are correct) that the defendant would be able to suppress the testimony of his then ex-spouse at trial.

Secondly, there is simply no excuse for a prosecutor eliciting testimony from a spouse when he *knows* of the existence of the marital relationship. Government prosecutors are, invariably, lawyers. Presumedly, they are aware of the long-established rule of law which makes such testimony inadmissible. If they may elicit it nonetheless, without sanction, and thereby obtain a criminal indictment, there is simply no effective means for curbing this abuse, with its substantial deleterious societal effects.

Under these circumstances, "the imperative of judicial integrity", *United States* v. *Peltier,* 1975, 422 U.S. 531, 536, 95 S.Ct. 2313, 2317, 45 L.Ed.2d 374; *Elkins* v. *United States,* 1960, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669, requires that the courts fashion a prophylactic rule which would bar prosecution upon an indictment based solely upon the unconsented to testimony of one spouse against the other spouse, *knowingly* elicited by the prosecutor in violation of the husband-wife privilege. Any other result would make the courts themselves willful accomplices in the destruction of the marital relationship, which is the very fiber of society.

II. As To The Petite Issue

It is undisputed that the present Federal prosecution was based upon the same acts and transactions which underlay the initial prosecution (and conviction) of the defendant in state court in Arkansas on state charges of possessing, with intent to distribute, marijuana. Prior to the return of the present Federal indictment — indeed, prior to the initiation of the Federal Grand Jury investigation into the matter — the Petitioner had been convicted and sentenced on the state charges, a circumstance which was well-known to the Assistant United States Attorney presenting the matter to the Grand Jury. Nevertheless, no prior authorization for the present prosecution was sought of or obtained from the appropriate Assistant Attorney General in the Criminal Division of the Department of Justice, as required by the *Petite* policy.

The Tenth Circuit was sharply divided in deciding the *Petite* issue. The five to three split of the en banc Court, and the sharply contrasting views of the majority and dissenting opinions highlight the need for Supreme Court resolution of this issue.[7]

The *Petite* issue has been fully discussed in the Petition for a Writ of Certiorari filed in the companion case of *United States* v. *Bruce Thompson,* No. 78-5087, filed July 17, 1978, at pp. 4-10 (attached as Appendix III, *infra*). In order to avoid burdening the Court with lengthy and repetitious matter, Petitioner adopts the "Reasons Why the Writ Should be Granted" section of the *Thompson* petition.

CONCLUSION

The Tenth Circuit has permitted the purposeful circumvention of the husband-wife testimonial bar by a government prosecutor, resulting in the criminal condemnation of the incriminated spouse and destruction of the marital relationship. The prosecution also failed to follow an im-

[7] Ironically, two of the three judges on the panel considering the Petitioner's appeal dissented from the en banc decision overruling the *Petite* claim. Thus, apparently, Petitioner would have prevailed on this point had the issue not been considered by the entire Tenth Circuit Court of Appeals sitting en banc.

portant Department of Justice policy designed to safeguard the rights of the accused to be free from multiple prosecutions, absent extraordinary and compelling circumstances. The issues are of obvious significance nationwide and ought to be considered by this Honorable Court. Therefore, the Application for a Writ of Certiorari ought to be granted.

Respectfully Submitted,

.....

GERALD M. BIRNBERG

WILLIAM E. YAHNER

8303 Southwest Freeway
Suite 909
Houston, Texas 77074
(713) 981-9595

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, GERALD M. BIRNBERG, a Member of the Bar of this Court, as Counsel for Petitioner herein, hereby certify that three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari have been served upon the Solicitor General of the United States by placement in the United States mails, postage prepaid, on this the ..... day of August, 1978, addressed to:

WADE H. McCREE, JR.
Solicitor General of the United States
10th & Constitution Avenue, N.W.
Room 614
Washington, D. C. 20530

.....

Gerald M. Birnberg

APPENDIX

APPENDIX I

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. LARRY FRENCH, *Appellant.*	No. 76-1879.
UNITED STATES OF AMERICA, *Appellee,* v. GEORGE BOEHM, *Appellant.*	No. 76-1880.
UNITED STATES OF AMERICA, *Appellee,* v. GUY WARREN PAYNE, *Appellant.*	No. 76-1881.
UNITED STATES OF AMERICA, *Appellee,* v. JAMES W. GALLMAN, *Appellant.*	No. 76-1882.

Appeal From The
UNITED STATES DISTRICT COURT
For The Western District Of Oklahoma
(D. C. # CR-76-76-E)

Carl A. Eklund, Denver, Colorado, for Appellants, Larry French, George Boehm, and Guy Warren Payne.

Gene Stipe, of Stipe, Gossett, Stipe & Harper, Oklahoma City, Oklahoma (Carl D. Hughes, Oklahoma City, Oklahoma, with him on the Breif), for Appellant, James W. Gallman.

John E. Green, Acting United States Attorney (William S. Price, Assistant United States Attorney, with him on the Brief), for Appellee, United States of America.

Before SETH, Chief Judge, LEWIS and LOGAN, Circuit Judges.

SETH, Chief Judge.

These appeals were consolidated as the defendants were convicted under the same indictment. This indictment charged a conspiracy to import marijuana from Colombia, the importation, and a conspiracy to distribute. The appellants raise different issues in their appeals. A brief fact statement is made in connection with the consideration of the issues as to each of the defendants.

The record as to the general plan shows that defendants Boehm and Payne went to New Orleans where they had extended discussions with the witnesses Haas and Walker about bringing drugs into the United States from Central and South America. The defendants indicated that they

had funds available or had an associate who could provide money to bring in drugs. The witnesses Walker and Haas were in fact drug enforcement agents. The plan developed and it was finally decided to bring in a DC-6 load of marijuana from Colombia. The defendants Boehm and Payne, or one of them, went with the agents to Colombia where the marijuana was purchased for $42,000.00 in cash, and arrangements made for it to be loaded at a later date. The group returned to the United States. It was agreed that the agents would rent a plane in Miami, pick up the marijuana, and fly it to Oklahoma. This was done with no one aboard the plane except the agents.

After stops in Jamaica and New Orleans, the plane landed in Oklahoma. At the landing in New Orleans, the contents were examined and tested by other drug agents, and surveillance began on the trip to Oklahoma. The marijuana, some eight to ten thousand pounds, was unloaded and taken by trucks to a farm in Arkansas. Apparently the distribution was then to begin as defendants from other states arrived there for that purpose. Of course, the entire proceeding was watched by the enforcement authorities and arrests made when the distribution was about to begin. The Arkansas state officers cooperated in the arrests, and some of the defendants were charged for possession with intent to distribute by the Arkansas authorities.

No. 76-1880 — United States v. George Boehm:

Defendant Boehm was indicted with the other defendants described in this consolidated appeal. He was in touch initially with the witnesses Walker and Haas who, of course, he did not know were federal agents. He with defendant Payne had the series of conversations with the agents in New Orleans over a two-week period.

Before the trial began for the other defendants, defendant Boehm filed a motion for severance. This was denied; however, he later became ill and was hospitalized. Another motion for severance was filed and it was granted. The others proceeded to trial. The trial ended about May 28th, and on June 10th, the appellant, an indigent with a court-appointed attorney, filed a motion that he be furnished at Goverment expense a transcript of the testimony of agent Walker given at the trial of the other defendants and from which he had been severed. The motion was denied, and this denial is advanced as error on this appeal.

We find no merit in defendant Boehm's argument that he should have been furnished a transcript. The testimony was given at a trial in which this defendant did not participate and from which he had moved to be separated. We find no authority for a free transcript in these circumstances.

The other point on appeal urged by this defendant is that the use of a tape recording of a prior inconsistent statement to impeach his credibility was improper. The recording was of a conversation between this defendant and agent Haas, and it related to the issue whether defendant knew that the plans were to import marijuana or something which was not contraband.

The record demonstrates that the statements of the defendant in the tapes were not consistent with his testimony at trial. We must hold that the tapes were properly admitted. Prior inconsistent statements can, of course, be admitted if the judge is of the view that there is an inconsistency. United States v. Hale, 422 U.S. 171. No particular method or procedure is required to be followed by the trial judge in arriving at the conclusion that there is an inconsistency. The judge was assured that there was

such an inconsistency and admitted the tapes without an *in camera* viewing with the condition that the jury would be admonished to disregard them if they were consistent. This in our view is sufficient. The inconsistency was established.

No other issues are raised by defendant Boehm.

The judgment is AFFIRMED as to defendant Boehm.

No. 76-1879 — United States v. Larry French:

This defendant French was indicted with the several other defendants whose appeals are considered in the cases consolidated with this appeal.

Before trial defendant French moved to suppress any testimony given by his wife, Barbara French, before the grand jury. He also moved before trial to sever his case from the others on the ground that the Government intended to call Barbara French as a witness against some of the codefendants and this testimony would be a violation of the marital privilege. The Government opposed the motion on the basis that it did not intend to call Barbara French as a witness against defendant, and the grand jury testimony would not be used at trial. The trial judge ruled that defendant's motion to suppress was confessed by the Government, and that the motion to sever would be denied for the same reason.

Other defendants filed pretrial severance motions on grounds including the assertion that they intended to call Barbara French as a witness, and that they should not be denied her testimony because of the marital privilege asserted by her husband. The trial court, however, decided to proceed.

Shortly after the trial began defendant French again moved for a severance and also for a mistrial. These were

denied. Sometime later in the trial this defendant filed further motions, including a motion for mistrial, asserting that the jury had become aware of his relationship with Barbara French and there was a violation of the marital privilege. The prosecution had then nearly completed its case in chief. The court granted defendant's motion for mistrial. About a month later when appellant's new trial was imminent, he waived jury trial and stipulated that the evidence at the first trial could be used in the second trial. Defendant French was found guilty on Count I and Count II, but not guilty on Count III.

The defendant French urges that the second trial was in violation of the double jeopardy clause of the Fifth Amendment. He argues that the court in its denial of his several motions to sever "overreached" in a way as to constitute "bad faith" as the term is used in the double jeopardy decisions concerned with waivers arising from motions for mistrial made by the defendant. The defendant asserts that it was apparent from the outset that his wife could not testify for or against anyone without involving him or affecting his defense. He asserts that the dangers were so obvious that the prosecution and the trial judge in proceeding with the case caused the defendant to move for a mistrial. United States v. Dinitz, ... U.S. ...., 96 S.Ct. 1075; United States v. Jorn, 400 U.S. 470.

The record shows that the Government agreed not to call Barbara French as a witness. The arrangements at the start of the trial appeared to the trial court to be a suitable solution. As the trial progressed, it became apparent that it was not working, and that her testimony was affecting defendant French. Thus when this defendant moved for a mistrial. it was granted. There were quite a number of defendants going to trial, and an attempt was made to plan the trial. It may not have worked but this

cannot be held to be within the doctrine that would nullify the waiver arising from the fact that the defendant was the moving party. *See also* United States v. Rumpf, ... F.2d .... (Tenth Circuit No. 76-1891); United States v. Hanson, ... F.2d .... (Tenth Circuit No. 76-1892); and related cases on the double jeopardy issue.

The defendant also urges that he should be resentenced. It is, however, apparent that the trial judge at the time of sentencing knew that a prior conviction of defendant was invalid. This had been brought to his attention during the course of the trial by a motion *in limine*. Under these circumstances the judge was not proceeding on the basis of misinformation, and United States v. Tucker, 404 U.S. 443, does not apply. It is apparent that 18 U.S.C. § 3577 gives the trial judge a broad range of subjects and matters to consider in sentencing. The statement by the trial court as to defendant's "bad acts" in connection with leniency is a reference to matters within the scope of the statute. The sentence given was within the statutory limits.

The defendant did not assert a husband-wife privilege during the grand jury proceedings, nor did his wife. We find no merit to defendant's challenge to the grand jury proceedings. United States v. Kysar, 459 F.2d 422 (10th Cir.).

The judgment against defendant French is AFFIRMED.

[The remainder of the Court's Opinion which is not germane to Petitioner is omitted.]

APPENDIX II

Before The Honorable Oliver Seth, The Honorable David T. Lewis, and The Honorable James K. Logan, Circuit Judges.

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. LARRY FRENCH, *Appellant.*	No. 76-1879.
UNITED STATES OF AMERICA, *Appellee,* v. GEORGE BOEHM, *Appellant.*	No. 76-1880.
UNITED STATES OF AMERICA, *Appellee,* v. GUY WARREN PAYNE, *Appellant.*	No. 76-1881.

OPINION ON PETITION FOR REHEARING

The defendants in these consolidated cases, by motions for rehearing, have raised several points pertaining to the opinion heretofore entered. We have examined the arguments and find that these issues were considered in arriving at the original opinion. We again find them to be without merit. The petitions for rehearing as to these trial and pretrial issues are denied.

The defendants have raised also the *Petite* policy on this appeal, and urged it in the petitions for rehearing.

We heard the companion case of United States v. Bruce Thompson, No. 76-1883, en banc with United States v. Robert Earl Fritz, No. 77-1027. In the en banc cases, we considered the *Petite* policy, and the majority opinions therein filed are held to be applicable, and to control, the *Petite* policy issue in these cases whether or not the matter was properly raised. The petitions for rehearing are thus also denied as to the *Petite* policy issue.

The petitions for rehearing are denied as to all issues therein raised.

APPENDIX III

PETITION FOR WRIT OF CERTIORARI TO THE

U. S. COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES

v.

BRUCE THOMPSON

No. 78-5087

(filed July 17, 1978)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case is ideally suited for review by this Court. The key facts are not in dispute. It raises issues of first impression concerning the implementation of the Department of Justice policy on dual prosecutions (hereinafter referred to as the *Petite* policy), presenting for review questions not addressed in this Court's decision in *Rinaldi* v. *United States,* ..... U.S. ....., 98 S.Ct. 81 (1977): whether due process of law requires that the *Petite* policy be enforced upon motion of the defendant in the absence of a government admission of error in the institution of the prosecution and request for its enforcement when the requisite prior authorization for a federal prosecution to be instituted subsequent to a state conviction for the same conduct has not been obtained; and whether after the fact authorization, obtained five months after the imposition of sentence, can remedy the defect in the institution of the prosecution. These questions are important to the proper and uniform administration of justice throughout the federal system and should be resolved by this Court.

[2] The recommendation contained substantial misstatements and referred to circumstances relating to individuals other than the petitioner.

I. Since the Overriding Purpose of the Petite Policy is to Protect the Individual From any Unfairness Associated with Needless Multiple Prosecutions it Must be Enforced, on Motion of the Defendant, Despite Government Opposition.

The policy regarding dual prosecutions, now known as the Petite policy,[3] was first issued by the Attorney General in a memorandum to United States Attorneys (and released to the press) in 1959. Recognizing the potential for unfairness in multiple prosecution situations and expressing a concern that the power to institute dual prosecutions be exercised with restraint, the Attorney General announced that despite the Constitutional permissibility of a federal prosecution following a state prosecution for the same conduct, such a prosecution should not be instituted unless the reasons for a subsequent federal prosecution were compelling and prior authorization for the federal prosecution had been obtained from the appropriate Assistant Attorney General.

This policy is now contained, in substance, in the United States Attorneys Manual, (see p. 2, *supra*) and has been reemphasized by inclusion in the United States Attorneys Bulletin (see, A. 20a-23a). It is not simply an internal housekeeping provision. Rather, as stated by this Court in *Rinaldi* v. *United States, supra,* the policy is not only concerned with the management of limited resources, but "also serves the *more important purpose* of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct". *Id.*, at 84 (emphasis added). Indeed, protection of the individual is the "overriding purpose" of the policy. *Id.*, at 86. This

[3] Although the *Petite* case itself involved successive federal prosecutions, the *Petite* policy "is most frequently applied against duplicating federal-state prosecutions". *Rinaldi* v. *United States, supra,* at 82 n. 5.

focus was further emphasized as this Court stated that the "purpose of the Government's *Petite* policy and the fundamental constitutional guarantee against double jeopardy" were "parallel". *Id.*, at 85.

Although the procedures established by the *Petite* policy may not be constitutionally mandated (see, e.g., *Rinaldi* v. *United States, supra* at 85), in light of the policy's protective purpose, constitutional necessity is not a predicate for requiring that it be adhered to. Due process of law requires that when an agency promulgates and publicizes policies and guidelines designed to safeguard the individual it apply them fairly and uniformly regardless of constitutional compulsion for their initial adoption, for "departures from an agency's procedures 'cannot be reconciled with the fundamental principle that ours is a government of laws, not men.'" *United States* v. *Heffner,* 420 F.2d 809, 812 (4th Cir. 1970)

For example, courts have required compliance with Internal Revenue Service procedures, requiring special agents of the intelligence division to provide warnings to taxpayers at the outset of an interview, even though recognizing that those procedures were not constitutionally mandated. See, e.g., *United States* v. *Heffner,* 420 F.2d 809, 812 (4th Cir. 1969) ("It is of no significance that the procedures or instructions which the Internal Revenue Service has established are more generous than the Constitution requires."); *United States* v. *Leahey,* 434 F.2d 7, 10 (1st Cir. 1970) ("Due process requires the Internal Revenue Service to follow its announced procedures"). And this Court has repeatedly required adherence to regulations voluntarily restricting the otherwise constitutionally permissible broad discretion of various governmental bodies. See, e.g., *Service* v. *Dulles,* 354 U.S. 363 (1956); *Vitarelli* v. *Seaton,* 359 U.S. 353 (1958); *Yellin* v. *United States,* 374 U.S. 109 (1962).

Nor, in light of its enunciated protective purpose, is the fact that the *Petite* policy is not a formal "Regulation" published in the Federal Register of any significance. In *Vitarelli* v. *Seaton, supra,* this Court required adherence to a Department of the Interior Order which was not formally promulgated in the Federal Register, and the Internal Revenue Service procedures enforced in *United States* v. *Heffner, supra,* were set forth in a press release. As the *Heffner* court stated, in terms applicable to this case:

> An agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. 420 F.2d at 811.
>
> * * * * *
>
> Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labelled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has broader sweep. The Supreme Court in *Vitarelli* v. *Seaton, supra,* applied it to a Department of the Interior "Order" . . . *Id.*, at 812.
>
> * * * * *
>
> . . . departures from an agency's procedures 'cannot be reconciled with the fundamental principle that ours is a government of laws, not men.' The arbitrary nature of such a departure is in no way ameliorated by the fact that the ignored procedure was enunciated in an instruction in a "News Release" . . . *Id.*

See also, *United States* v. *Leahey, supra; Smith* v. *Resor,* 406 F.2d 141 (2nd Cir. 1964) (Army "Weekly Bulletin" enforced); *United States ex rel. Coates* v. *Laird,* 494 F.2d 709 (4th Cir. 1974) (Department of Defense Directive enforced); *United States ex rel. Brooks* v. *Clifford,* 409 F.2d 700 (4th Cir. 1969) (same); *United States* v. *Ewig Bros. Co., Inc.,* 502 F.2d 715 (7th Cir. 1974) (government properly

assumed the burden of showing compliance with F.D.A. Interim Guidelines set forth in a press release).

In light of the principles and cases set forth above, petitioner submits that the failure to adhere to a policy intended to afford protection to the individual — whether formally promulgated or not — constitutes a denial of due process of law; it is only where a policy is simply an internal housekeeping provision, that noncompliance does not necessarily conflict with due process.[4] He further submits that, in light of this Court's opinion in *Rinaldi* v. *United States*, *supra*, the characterization of the *Petite* policy as a housekeeping provision by the Court below is clearly erroneous and that the judgment of that Court must be reversed.

II. Authorization Obtained Five Months After the United States District Court Imposed Sentence Upon a Conviction Based on the Same Conduct Which had Resulted in a Prior State Conviction Does Not Comply with the Requirements of the Petite Policy.

Five months after the imposition of sentence by the United States District Court the United States Attorney obtained authorization for the already completed federal prosecution. Petitioner submits that this after the fact authorization serves only as a governmental admission of the applicability of the *Petite* policy to the instant case. It does not comply with the requirements of the policy. As stated above, the *Petite* policy protects interests parallel to those safeguarded by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution; it is concerned with protection against any unfairness associated

[4] Because enforcement turns on the purpose of the policy, any reliance on *Sullivan* v. *United States*, 348 U.S. 170 (1954) is misplaced here. This Court found that the order violated in *Sullivan* was not intended to safeguard any individual interests, but was simply an internal housekeeping provision. The *Petite* policy, to the contrary, is focused on protecting the individual.

with multiple prosecutions, not simply multiple convictions. These interests cannot be safeguarded by post conviction authorizations. (See, e.g., *Abney* v. *United States*, 431 U.S. 651 (1977) where this Court held that safeguarding the interests protected by the Double Jeopardy Clause requires allowing immediate appeal from the denial of a pre-trial motion to dismiss based on double jeopardy grounds).

The even-handed, non-arbitrary determination as to the existence of a compelling federal interest in a second prosecution for the same conduct required by principles of due process can be adequately ensured only if that judgment of need is not affected by hindsight of other extraneous considerations.[5] Moreover, to permit after the fact

[5] Petitioner submits that the after the fact authorization here was simply an effort to rationalize its noncompliance with the *Petite* policy rather than the dispassionate assessment as to the existence of a compelling federal interest called for by the policy. Neither of its justifications are relevant, much less compelling.

First, the government relies on *Blockburger* v. *United States*, 284 U.S. 299 (1932) and *Gore* v. *United States*, 357 U.S. 386 (1958), which upheld consecutive federal sentences for violations of separate federal statutory schemes, to support the "suggestion" that Congress intended, when it passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which petitioner was prosecuted, to "turn the screw" on drug offenders presumably to the extent of overriding the government's policy against successive state and federal prosecutions. It is self-evident that such previous and inapposite authority does not support any such "suggestion" of Congressional intention in 1970.

In the absence of such an intention on the part of Congress, the government's decision to "turn the screw" on offenders who have already been punished in state court for the same conduct amounts to no more than a thirst for retribution, which is clearly an impermissible basis for further prosecution. *Cincci* v. *Illinois*, 356 U.S. 571 (1958).

The second justification offered by the government for the dual prosecution is the federal concern with the crime of importation and implementation of federal treaty obligations. However, this concern is simply inapplicable to petitioner who

authorization provides for greater potential for abusive "manipulation" of the policy to serve interests other than those it was designed to meet than did the government tactics which disturbed some members of this Court in *Rinaldi* v. *United States, supra.* Accordingly, the after the fact authorization cannot remedy the failure to obtain the prior authorization required by the *Petite* policy, and the court below erred in holding to the contrary.

---

was neither charged with, nor convicted of, the importation offenses. *Contrast, United States* v. *Houltin*, 553 F.2d 991 (5th Cir. 1977), where prosecution for conspiracy to import marijuana was found to involve a compelling federal interest, while prosecution for conspiracy to possess lacked a judicial interest independent of the interests vindicated by the state conviction of possession of marijuana.

Nos. 78-209 and 78-5204

In the Supreme Court of the United States

OCTOBER TERM, 1978

LARRY FRENCH, PETITIONER

v.

UNITED STATES OF AMERICA

GUY WARREN PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JAMES A. HUNOLT
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-209

LARRY FRENCH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-5204

GUY WARREN PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (78-5204 Pet. App. A) and the opinion of the court of appeals denying the petitions for rehearing (78-5204 Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. Petitions for rehearing were denied on July 6, 1978. The petition for a writ of certiorari in No. 78-209 was filed on August 5, 1978. The petition for a writ of certiorari in No. 78-5204 was filed on August 7, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conduct of government agents in this case constituted entrapment as a matter of law (No. 78-5204).

2. Whether petitioner Payne was denied the effective assistance of counsel by the manner in which bench conferences were conducted (No. 78-5204).

3. Whether the trial court erred in admitting evidence of petitioner Payne's prior conviction for possession of marijuana without requiring the government to produce a certified copy of the record of that conviction (No. 78-5204).

4. Whether petitioners are entitled to relief on the ground that they were prosecuted in violation of the *Petite* policy (both petitions).

5. Whether the indictment should have been dismissed because petitioner French's wife testified before the grand jury (No. 78-209).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner Payne was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963 (Count 1), importing marijuana, in violation of 21 U.S.C. 952 (Count 2), and conspiring to distribute

marijuana, in violation of 21 U.S.C. 846 (Count 3). He was sentenced to concurrent terms of four years' imprisonment on Counts 1 and 3 and to a consecutive term of four years' imprisonment on Count 2.[1] Payne was also fined $15,000 on Count 1.

After a jury-waived trial in the same court,[2] petitioner French was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963 (Count 1), and importing marijuana, in violation of 21 U.S.C. 952 (Count 2). He was sentenced to consecutive terms of four years' imprisonment on the two counts. The court of appeals affirmed in both cases (78-5204 Pet. App. A).

The evidence at trial showed that on July 27, 1975, John Walker, an undercover agent and pilot for the Drug Enforcement Administration, and Joseph Haas, an informant and commercial pilot, met with petitioner Payne and co-conspirator George Boehm in Kenner, Louisiana (Tr. 250, 252).[3] During the meeting, petitioner Payne stated that he had money to start an operation to import marijuana for distribution in the United States (Tr. 254-255). Payne asked Walker and Haas to fly to Mexico to pick up 3,800 pounds of marijuana (Tr. 255). However, Walker told Payne that they did not want to get involved in drug operations in Mexico (*ibid.*). Petitioner then offered to pay Walker and Haas $10.00 for each pound of marijuana they delivered to him from Colombia, and the two pilots agreed (Tr. 256).

---

[1]The sentence was made consecutive to a prior state sentence.

[2]Petitioners were named as co-defendants in the same indictment. Petitioner French was granted a mistrial, however, during the joint trial. He then waived his right to a jury trial and stipulated to the evidence presented at the prior trial.

[3]George Boehm was convicted in a separate trial, and the conviction was affirmed by the court of appeals. A petition for a writ of certiorari is pending in that case (No. 78-5203).

On September 29, 1975, Walker, Haas, and petitioner Payne flew to Colombia (Tr. 260). Payne carried $42,000 in his boots (Tr. 261-262). After arriving in Colombia, Payne contacted petitioner French, and the four met the following day (Tr. 263-264). Payne gave French the $42,000, and French said that he would "talk to the Colombians and see if it could be arranged" (Tr. 266). The next day French took Walker and Haas to survey a clandestine landing strip (Tr. 281-285). Later French, Walker, and Haas discussed the details of transporting the marijuana (Tr. 291-293). French told Walker that he should fly to Colombia on October 11, 1975, to pick up the marijuana and that 10,000 pounds would be transported (Tr. 292). Walker, Haas, and Payne subsequently returned to the United States (Tr. 293-294).

Walker rented an airplane on October 10, 1975, and flew with Haas to Colombia (Tr. 294-301). Approximately four tons of marijuana were loaded onto the aircraft, which was then flown to Chickasha, Oklahoma (Tr. 301-305). Walker and Haas were met there by petitioners and others, and the marijuana was loaded into two trucks and taken to a farm in Arkansas (Tr. 306-308, 586-587).

ARGUMENT

1. Petitioner Payne contends (78-5204 Pet. 4) that he was entrapped as a matter of law because government agents actively participated in the criminal scheme. But the focus of the entrapment defense is not on governmental conduct, but is "on the intent or predisposition of the defendant to commit the crime." *Hampton* v. *United States,* 425 U.S. 484, 488 (1976) (plurality opinion), quoting *United States* v. *Russell,* 411 U.S. 423, 429 (1974). "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States* v. *Russell, supra,* 411 U.S. at 436. Petitioner has not suggested that he

lacked the predisposition to commit the offenses proved at trial, and the evidence shows clearly that petitioner was not an "unwary innocent" (*ibid.*, quoting *Sherman* v. *United States,* 356 U.S. 369, 372 (1958)) but was instead predisposed to engage in such unlawful conduct. Accordingly, the court of appeals correctly concluded (No. 78-5204 Pet. App. 12) that petitioner was not entitled to the entrapment defense as a matter of law.[4]

Nor was the conduct of the government agents "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell, supra,* 411 U.S. at 431-432. The activity of the agents in flying the marijuana from Colombia to Oklahoma supplied only one element in the petitioner's scheme to import and distribute marijuana, and the participation was solicited and directed entirely by petitioners. Petitioner Payne has suggested no basis on which it could be concluded that the agent's conduct was so outrageous as to deprive him of due process of law, and the court of appeals properly rejected this claim (No. 78-5204 Pet. App. 12).

2. Petitioner Payne contends (78-5204 Pet. 4-5) that he was denied effective assistance of counsel because the district court allowed only one attorney at a time to attend bench conferences. Fourteen defense attorneys participated in the trial, which involved several co-defendants. Although the record does not disclose any ruling by the trial judge limiting the number of counsel allowed to approach the

---

[4]Petitioner Payne asserts that there is a conflict among various courts on the issue whether proof of substantial police involvement alone may sustain the entrapment defense. Each of the cases upon which petitioner relies, however, was decided prior to *Hampton, supra.*

bench,[5] a number of bench conferences occurred at which only one defense counsel was present (*e.g.*, Tr. 369, 979, 1042-1044, 1634). On other occasions, however, two or more defense counsel conferred at the bench (*e.g.*, Tr. 310-312, 878, 937-938, 1654-1657). When petitioner Payne's counsel wished to approach the bench, he did so (Tr. 2288-2289). The bench conferences routinely involved matters of significance only to those participating (*e.g.*, Tr. 1232, 1484-1485, 1634), and the trial judge allowed other counsel to be present upon request (Tr. 1121-1122). Matters of general importance to all or several defendants were discussed at conferences held out of the presence of the jury and in the presence of all counsel (Tr. 296, 346, 440-446, 481, 495-499, 538-541, 666-682, 1416-1443, 1554-1556, 1841-1845, 2290-2295).

Petitioner Payne points to no instance in which the trial court's procedures for conducting bench conferences adversely affected his representation. The district court's conduct of the trial merely conformed to the necessities of a large trial involving several defendants. Petitioner Payne's attorney was regularly given the opportunity to address the trial judge out of the jury's presence, and there is no basis for any claim that petitioner was denied the effective assistance of counsel.

3. Petitioner Payne urges (78-5204 Pet. 3, 5) that the trial court erred in admitting evidence of petitioner's prior conviction for possession of marijuana without requiring the prosecutor to produce a certified copy of the judgment of conviction. At trial, petitioner Payne asserted an entrapment defense. During cross-examination he conceded that he had been convicted of possessing 165

[5]According to petitioner (78-5204 Pet. 3), a co-defendant moved to have the transcript expanded to include the ruling, but that motion was denied.

pounds of marijuana in 1975 (Tr. 1912). Upon redirect examination, however, Payne testified that he was in fact innocent of the prior offense and that he had pleaded guilty to that charge only because his defense witness was unavailable (Tr. 1913-1914). A narcotics agent testified during the government's rebuttal that he had observed Payne commit the prior offense and that he had been present at the guilty plea proceedings. Contrary to Payne's testimony, the agent stated that Payne's purported defense witness was available to testify if a trial had been held (Tr. 2270-2277).

Petitioner has conceded the fact of the prior conviction. Since there was no dispute at trial that petitioner previously had been convicted, there was no reason to produce a certified record of that conviction. A copy of the judgment would have revealed no relevant information concerning the dispute that arose at trial regarding the facts underlying the conviction. Accordingly, the court properly rejected petitioner's request that the official record of conviction be produced at trial.

4. Petitioners claim (78-5204 Pet. 5-7; 78-209 Pet. 18-19) that they were prosecuted in violation of the *Petite* policy. On October 15, 1975, petitioners were arrested by state law enforcement officers in Arkansas. They were subsequently convicted in state court of possession of marijuana. Thereafter, the present federal indictment was returned, and petitioners were tried and convicted in federal court. The state and federal convictions both arose from the same criminal scheme.

The federal prosecution was not authorized in advance by the Attorney General, or Assistant Attorney General, in accordance with the *Petite* policy, adopted by the Department of Justice to limit successive federal and state prosecutions to cases where there are compelling reasons for

the federal prosecution. See *Rinaldi* v. *United States*, 434 U.S. 22 (1977); *Petite* v. *United States*, 361 U.S. 529 (1960). However, on December 17, 1977, while petitioners' appeals were pending, the federal prosecution was authorized *nunc pro tunc* by Attorney General Bell.

Petitioners first raised the claim that the federal prosecution violated the *Petite* policy in petitions for rehearing before the court of appeals. Petitioners contended that the federal prosecution was barred because it was not authorized in advance in conformity with normal practice under the *Petite* policy. The court of appeals rejected this claim, relying upon its prior en banc decisions in *United States* v. *Thompson*, No. 76-1883 (June 15, 1978), cert. denied, No. 78-5087 (Oct. 10, 1978), and *United States* v. *Fritz*, No. 77-1027 (July 3, 1978), petition for a writ of certiorari pending, No. 78-5192.

The petitioner in *Thompson* was indicted along with the petitioners in this case, and the prosecution of petitioners and Thompson was authorized *nunc pro tunc* at the same time by the Attorney General.[6] We therefore rely upon our memorandum in *Thompson*, in which we submitted that the administration of the *Petite* policy represents an exercise of prosecutorial discretion by the Department of Justice and creates no judicially enforceable rights in defendants, that the *nunc pro tunc* authorization of federal prosecutions complies with the aims of the *Petite* policy, and that, in any event, no prejudice results from such authorizations.[7]

---

[6]Thompson pleaded guilty in federal court to conspiracy to distribute marijuana after he had been convicted of possession of marijuana in state court.

[7]We are sending a copy of our memorandum in *Thompson* to petitioners' counsel.

5. Petitioner French contends (78-209 Pet. 11-18) that the indictment must be dismissed because his wife testified before the grand jury in violation of the privilege against adverse spousal testimony.[8] But the indictment is facially valid, and "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *Costello* v. *United States*, [350 U.S. 359 (1956)]; *Holt* v. *United States*, 218 U.S. 245 (1910) * * *." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). See *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958). Petitioner's claim that the grand jury heard incompetent evidence thus provides no basis for dismissal of the indictment.[9]

Petitioner argues that the prosecutor acted in bad faith in calling petitioner's wife before the grand jury and that the indictment should therefore be dismissed. In the government's response to a pretrial motion filed by French, however, the prosecutor advised the district court that (R. 224-225):

> [P]rior to the January Session of the Grand Jury, Assistant United States Attorney Floy Dawson entered into plea bargain discussions with defendant's counsel relative to Barbara French [petitioner's wife]. It was agreed that Barbara French would remain as unindicted co-conspirator, in return for her testimony and co-operation. When asked about the "husband-wife"

---

[8]The privilege against adverse spousal testimony is distinct from the privilege against disclosure of confidential marital communications. *United States* v. *Fisher*, 518 F. 2d 836, 838 n.2 (2d Cir.), cert. denied, 423 U.S. 1033 (1975); 8 Wigmore, *Evidence* § 2334 (McNaughton rev. ed. 1961). Petitioner relies only upon the former privilege.

[9]Petitioner French asserts (78-209 Pet. 4) that his wife was the only witness to testify before the grand jury. The prosecutor represented to the district court, however, that in fact numerous other witnesses testified against petitioner French before the grand jury, and that their testimony was ample to support the indictment independent of any testimony by French's wife (R. 335-336).

> privilege problems that could arise from this situation, Assistant United States Attorney Dawson was advised that [petitioner] Larry French was going to plead guilty, and accordingly, there would be no problems in this regard.

After the indictment was returned, petitioner French pleaded not guilty. The negotiations leading to the appearance of Barbara French before the grand jury, however, reveal that the claim of prosecutorial misconduct is unfounded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JAMES A. HUNOLT
Attorney

OCTOBER 1978

DOJ-1978-10